IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. CF01-07078A1-XX
DIVISION: F9

MARK POOLE,

Defendant.
_____/

SENTENCING ORDER

On November 1, 2001, the defendant, Mark Anthony Poole was indicted for the first-degree murder of Noah Scott, attempted first-degree murder of [redacted] armed burglary of a dwelling occupied by Noah Scott and/or [redacted] sexual battery [redacted] with force likely to cause serious personal injury, and armed robbery with a deadly weapon.

On April 27, 2005, the defendant was convicted by a jury for the crimes of first-degree murder with a weapon, attempted first-degree murder with a weapon, armed burglary with intent to commit an assault or battery with a weapon, sexual battery with great force, and armed robbery with a deadly weapon. The jury recommended by votes of twelve to zero (12-0) that the defendant be sentenced to death for the murder of Noah Scott. On August 25, 2005, the Honorable J. Dale Durrance, Circuit Judge, Tenth Judicial Circuit, sentenced the defendant to death. The defendant was also sentenced to life in prison for the attempted first-degree murder of [redacted], life in prison for burglary with intent to commit assault with a weapon, life in prison for sexual battery of [redacted] and life in prison for armed robbery with a deadly weapon, each count to run consecutive to each other and consecutive to the sentence of death.

In Poole v. State, the Florida Supreme Court affirmed Poole's conviction, but vacated his sentence of death and remanded to the trial court to conduct a new penalty phase consistent with the Court's opinion. 997 So.2d 382, 397 (Fla. 2008).

The new penalty phase commenced on June 20, 2011. On June 28, 2011, the jury

recommended by votes of eleven to one (11-1) that the defendant be sentenced to death for the murder of Noah Scott. The Spencer[1] hearing was held on July 29, 2011, wherein the Court heard additional argument for mitigation and legal arguments. Both parties submitted sentencing memoranda to the Court. Final sentencing was set for August 19, 2011.

The Court heard evidence presented during the penalty phase. The Court had the benefit of the parties' legal memoranda and their argument in favor of, and in opposition to, the death penalty. The Court also reviewed the trial transcripts of the following witnesses: [redacted] Ransom Simmons, M.D., and William Kremper, Ph.D., and Joseph John Sesta, PhD., M.P. Additionally, the Court reviewed a multitude of cases issued by the Florida Supreme Court concerning a trial court's responsibility when imposition of the death penalty is considered, as well as cases involving the relevant aggravating and mitigating circumstances. Finally, this Court gives great weight to the jury's recommendation, Smith v. State, 515 So.2d 182 (Fla. 1987), and pursuant to section 921.141, Florida Statutes (2010), will reevaluate all relevant aggravating and mitigating circumstances. The Court now finds as follows:

FACTS

[redacted], n/k/a [redacted] was eighteen (18) years old on October 12, 2001. She was a senior in high school and was approximately five (5) months pregnant at the time of the attack. Ms. [redacted] and her fiancé, Noah Scott, were living in a mobile home at the Orangewood Mobile Home Park in Lakeland, Florida. Mr. Scott was twenty-five (25) years old at the time of the murder.

Ms. [redacted] testified that she and Mr. Scott went to bed at approximately 11:30 p.m. on the night of October 12, 2001. Ms. [redacted] was awakened when the defendant placed a pillow over her face. She could hear Noah Scott trying to get up. Ms. [redacted] said that the position of the pillow allowed her to see the arm of the person on top of her. She was able to see that the defendant

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

was armed with a long black object. As the defendant was raping Ms. White, Noah Scott came to her defense and was repeatedly struck about the head with a tire iron. Ms. [redacted] was unable to determine the number of times Mr. Scott was struck by the tire iron, but testified, "I just know it was a lot." The medical examiner, Dr. Stephen Nelson, testified that Noah Scott was struck fifteen (15) times, thirteen (13) of which were to the head. Ms. [redacted] stated that Mr. Scott made several attempts to come to her aid and each time was struck by a blunt instrument. Thus, the Court concludes that Mr. Scott was not rendered unconscious or killed in a single assault.

Ms. [redacted] said she was conscious throughout the attack and begged the defendant not to hurt her or her unborn child. After she was raped, the defendant rolled her on to her stomach and hit her repeatedly in the back of her head with the tire iron. At that point, Ms. [redacted] was going in and out of consciousness. Ms. [redacted] testified that just before the defendant left the residence, "he came back in the room and he touched my vaginal area again and he told me thank you." The next morning, Ms. [redacted] managed to call 911 and Lakeland Police Officers were dispatched to the residence. They found [redacted] severely injured and Noah Scott dead.

Ransom Simmons, M.D., an emergency physician at Lakeland Regional Medical Center, testified that he treated Ms. [redacted] in the emergency room on the morning of October 13, 2001. Dr. Simmons said she was seriously injured. Ms. [redacted] had multiple lacerations to the left side of her face and to the back of the scalp. [redacted] A CAT scan revealed minimally displaced, minimally depressed skull fractures of the occipital bone. Ms. [redacted] also suffered significant blood loss. Dr. Simmons testified that Ms. [redacted] no doubt would have died had she not been pregnant, which resulted in her having more fluid than she would normally have.

Steven Nelson, M.D., Chief Medical Examiner for the Tenth Circuit, testified that Noah Scott died from blunt-force trauma. Mr. Scott had a total of fifteen (15) lacerations to the body, thirteen (13) of which were on his head. He suffered multiple calvarial fractures, cerebral contusions,

subarachnoid hemorrhage, subgaleal and subscalpular hemorrhage, and subendocardial hemorrhage. In other words, Dr. Nelson said, Mr. Scott's brain was full of blood.

A. Aggravating Circumstances

1. The defendant was contemporaneously convicted of another capital felony or a felony involving the use or threat of violence to the person.

On April 27, 2005, the original trial jury found the defendant guilty of attempted first-degree murder of [redacted], armed burglary with intent to commit an assault or battery with a weapon, sexual battery of [redacted], and armed robbery with a deadly weapon. The jury is the ultimate fact-finder, and this Court finds that there was competent, substantial evidence to support the jury's verdict.

In Whitfield v. State, 706 So.2d 1 (Fla.1998), Mr. Whitfield was convicted of raping Willie Mae Brooks at knife point and first-degree murder of Claretha Reynolds. The jury recommended death by a vote of seven to five (7-5). Whitfield, 706 So.2d at 3. The trial judge found three aggravating factors: "contemporaneous sexual battery of another victim in the case; commission in the course of a burglary; and the murder was heinous, atrocious, or cruel." Id. The Florida Supreme Court affirmed the conviction and sentence of death. In Whitfield v. State, 923 So.2d 375 (Fla.2006), the defendant sought post conviction relief. The Court, in affirming the trial court's denial of Whitfield's post conviction motion, said "In light of the three strong aggravators in this case, '**prior violent felonies** (two prior aggravated batteries and contemporaneous **sexual battery** of another victim in this case); commission in the course of a burglary; and that the murder was heinous, atrocious, or cruel,' the sentence would not have been different had the sentencing court given more weight to the non statutory mitigators." Whitfield, 923 So.2d at 386.

In Bevel v. State, 983 So.2d 505 (Fla. 2008), the Florida Supreme Court affirmed a sentence of death with the single aggravator of prior violent felony. "Even though this is a single aggravator case, the aggravator was given 'very great weight'...." Bevel, 983 So.2d at 524.

Furthermore, in Sireci v. Moore, the Florida Supreme Court found that the prior violent felony conviction aggravator is one of the "most weighty" in the Florida sentencing scheme. 825 So.2d 882, 887 (Fla.2002).

The Court finds that the attempted first-degree murder conviction in this case establishes the violent felony conviction aggravator. The Court also finds that the attempted murder and rape of [redacted], an eighteen year old pregnant female, was extremely brutal. Furthermore, this Court believes that had Ms. [redacted] died, it would have met the definition of heinous, atrocious, and cruel.

The Court further finds that the armed burglary, sexual battery with great force, and the armed robbery with a deadly weapon merges into the second aggravator below. Therefore, the Court is not considering the armed robbery, sexual battery with great force, and the armed robbery with a deadly weapon to establish this aggravating circumstance.

Thus, the Court finds this aggravating circumstance was proven beyond and to the exclusion of every reasonable doubt and assigns it very great weight.

2. The capital felony was committed while the defendant was engaged in the commission of, or attempt to commit, or in flight after committing or attempting to commit the crimes of armed burglary, sexual battery with great force, and armed robbery.

The previous jury convicted the defendant of armed burglary with intent to commit assault with a weapon, sexual battery with great force, and armed robbery with a deadly weapon. The jury is the ultimate fact-finder, and this Court finds that there was competent, substantial evidence to support the jury's verdict.

Ms. [redacted] testified that after she was brutally raped, the defendant rolled her on to her stomach and shoved her head into the pillow. She then stated that, when she tried to turn her head, "he would tell me to turn it back over and not to look at him and then he started hitting me on

the back of the head, asking where money was. And I would tell him we didn't have any and he just kept hitting me."

At some point after the attack, the defendant left the bedroom and Ms. [redacted] managed to get out of bed and put some clothes on before passing out. Before leaving the mobile home, the defendant took several video games which he later sold to a neighbor for fifty (50) dollars.

Thus, the Court finds this aggravating circumstance was proven beyond and to the exclusion of every reasonable doubt and assigns it great weight.

3. The capital felony was committed for financial gain.

"Generally, when a homicide occurs during the course of a robbery, it is improper for the trial court to find as aggravation both that the homicide was committed during the course of a robbery and that the homicide was committed for pecuniary gain." Chamberlain, 881 So.2d at 1106 (citing Barnhill v. State, 834 So.2d 851, 836 (Fla.2002); Provence v. State, 337 So.2d 786, 783 (Fla.1976)). "Improper **doubling** occurs when both aggravators rely on the same essential feature or aspect of the crime. However, there is no reason why the facts in a given case may not support multiple aggravating factors so long as they are separate and distinct aggravators and not merely restatements of each other...." Banks v. State, 700 So.2d 363, 367 (Fla. 1997). "Therefore, when considering the issue of doubling, the focus is on the aggravators themselves, not on the overlapping facts." Spann v. State, 857 So.2d 845, 856 (Fla. 2003).

In this case, the jury convicted the defendant of armed burglary with intent to commit an assault or battery with a weapon, and sexual battery with great force. It is clear from the evidence in the case that the first thing the defendant did after entering the dwelling was rape Ms. [redacted] After completing the attack on Ms. [redacted] and Mr. Scott, the defendant took several video games which he later sold to a neighbor for fifty (50) dollars.

Here, unlike Robertson v. State, 611 So.2d 1228, 1233 (Fla. 1993) the defendant clearly had a "broader purpose" than theft in committing the armed burglary, i.e., the rape of Ms. [redacted].

Armed burglary with intent to commit an assault or battery with a weapon, and sexual battery with great force are unrelated to pecuniary gain and they do not constitute improper doubling. Willacy v. State, 696 So.2d 693, 696 (Fla.1997) (citing Henry v. State, 613 So.2d 433, 429 (Fla.1992)). It is clear that the facts in support of these aggravating factors overlap. However, that does not prohibit the use of the same facts to support multiple aggravating factors. See Banks, 700 So.2d at 367.

In this case, the Court finds that the armed robbery with a deadly weapon and the pecuniary gain would be improper doubling and thus, they merge. However, the Court finds that, based on the totality of the circumstances, pecuniary gain does not merge with the armed burglary and sexual battery. Therefore, this aggravating circumstance was proven beyond and to the exclusion of every reasonable doubt and the Court assigns it less than moderate weight.

4. The capital felony was especially heinous, atrocious or cruel. HAC

"The focus of the HAC aggravator centers on the means and manner in which the death is inflicted upon the victim and the victim's perceptions of the surrounding circumstances." McGirth v. State, 48 So. 3d 777, 794 (Fla.2010) (citing Victorino v. State, 23 So. 3d 87, 104 (Fla.2009); Schoenwetter v. State, 931 So2d 857, 874 (Fla.2006)). "The aggravator is applicable where the murder is 'both conscienceless or pitiless and unnecessarily tortuous to the victim.' " McGirth, 48 So. 3d at 794. (quoting Victorino, 23 So.3rd at 104). "The HAC aggravator is 'proper only in torturous murders – those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or the enjoyment of the suffering of another.' " Id.

The Florida Supreme court has "consistently upheld HAC in **beating deaths**." Lawrence v. State, 698 So.2d 1219, 1222 (Fla.1997). See also Dennis v. State, 817 So.2d 741, 766 (Fla.2002). This Court is aware that for the HAC aggravator to apply in beating cases, the victim must be conscious for at least part of the attack. Bogle v. State, 655 So.2d 1103, 1109 (Fla.1995). See also Wilson v. State, 493 So.2d 1019, 1023 (Fla. 1986).

In this case, Noah Scott was struck fifteen (15) times with a tire iron. Several of those blows were to his arms and were likely defense wounds. He suffered thirteen (13) blows to the head, resulting in multiple skull fractures and hemorrhaging to four (4) areas of his brain. According to the testimony of Ms. [redacted], Mr. Scott made several attempts to defend her from the defendant's attack. Thus, this Court concluded he was not rendered unconscious upon receiving the first blow. See Elam v. State, 636 So.2d 1312, 1314 (Fla.1994).

The evidence heard by this Court established beyond a reasonable doubt that the murder of Noah Scott was conscienceless or pitiless and unnecessarily torturous. This Court can only imagine the fear and pain experienced by Mr. Scott during the final moments of his life as he attempted to stop the brutal rape of his pregnant fiancé, [redacted]

Thus, the Court finds this aggravating circumstance was proven beyond and to the exclusion of every reasonable doubt and assigns it very great weight.

B. Mitigating Circumstances

The Court understands that mitigating circumstances need not be proven beyond a reasonable doubt by the defendant. "A mitigating circumstance need only be proved by the greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of a mitigating circumstance. Fla. Std. Jury Instr. (Crim.) [7.11 Penalty Proceedings – Capital Cases]. In fact, "[a] trial court must find as a mitigating circumstance each proposed factor that has been established by the greater weight of the evidence and that is truly mitigating in nature." Coday v. State, 946 So. 2d 988, 1003 (Fla. 2006). See Ault v. State, 53 So. 3d 175, 186 (Fla. 2010).

Non-Statutory Mitigating Circumstances

1. The defendant has borderline intelligence.

William Kremper, PH.D., a forensic psychologist, completed a psychological evaluation of the defendant, Mark Anthony Poole. He testified that the defendant had a verbal IQ of seventy-

eight (78). The defendant's ability to attend to information and formulate a response fell within an average range. Dr. Kremper said his IQ was in the borderline range, which is seventy (70) to seventy-nine (79). Dr. Kremper was of the opinion that the defendant is not mentally retarded, but functions at a low level. He reads at about a sixth grade level.

The Court will note that numerous relatives of Mr. Poole testified that after he quit high-school, the defendant learned how to pour concrete. Further, the defendant ran his own concrete business for approximately five (5) years.

Thus, the Court finds this mitigating circumstance was proven and assigns it little weight.

2. The defendant dropped out of school, either in the ninth or tenth grade.

Family members testified that Mr. Poole was doing poorly academically and quit school in either the ninth or tenth grade. He then went to work for a relative who owned a concrete business.

Thus, the Court finds this mitigating circumstance was proven and assigns it very little weight.

3. The defendant lost his best friend, father figure, and employer, which had an emotional effect on the defendant and led to his drug abuse.

After quitting school, the defendant went to work for Mr. Jurva Bryant, who taught him the concrete business. Mr. Bryant was murdered in 1988. The defendant then worked for Jurva Bryant, Jr., whom he described to Dr. Kremper as his best friend. He died several years later as a result of being run over by a car. Following his death, according to the defendant, he started drinking heavily. Nonetheless, he started his own concrete business that he ran successfully for approximately five (5) years.

According to the history the defendant provided to Chowallur Chacko, M.D., a forensic and addiction psychiatrist, the defendant began drinking at age fifteen (15) and used cannabis at age sixteen (16).

Neither Dr. Kremper nor Dr. Chacko gave testimony to support this mitigator. However, several relatives opined that the death of Mr. Bryant, Jr., had an emotional effect on the defendant.

Thus, the Court finds this mitigating circumstance was proven and assigns it very little weight.

4. The defendant sought help for his drug problem in the past.

In his history to Dr. Kremper, the defendant reported a voluntary admission to a thirty (30) day inpatient alcohol treatment facility in Louisiana. He relapsed four (4) or five (5) months later.

Thus, the Court finds this mitigating circumstance was proven and assigns it very little weight.

5. The defendant had an alcohol abuse problem at the time of the crime.

The defendant told Dr. Kremper that he estimates having consumed twelve (12) to fifteen (15) beers daily at the time of the offense.

Thus, the Court finds this mitigating circumstance was proven and assigns it very little weight.

6. The defendant had a drug abuse problem at the time of the crime.

The defendant told Dr. Kremper that his drug of choice was crack cocaine, and that he typically used two (2) "rocks" daily. He did not remember if he used on the day of the offense, but he told Dr. Kremper he probably did two (2) rocks (crack cocaine).

Thus, the Court finds this mitigating circumstance was proven and assigns it very little weight.

7. The defendant has and can continue a relationship with his son.

The defendant never married, but had a child with DeShawn Williams. Their son is now fourteen (14) years old. The child was raised primarily by Ms. Williams and the defendant's mother. The defendant has seen the young man on several occasions in the last ten (10) years. They have communicated sporadically by phone and letter since the defendant's incarceration.

Thus, the Court finds this mitigating circumstance was proven and assigns it very little weight.

8. The defendant has a strong work ethic.

Several relatives testified that the defendant was a hard worker prior to abusing drugs and alcohol.

Thus, the Court finds this mitigating circumstance was proven and assigns it very little weight.

9. The defendant is a religious person.

There is a little doubt that the defendant's family (his parents in particular) is extremely religious. The church they helped build and attend is made up of family members. At one time, the defendant attended church with his family; however, his family saw very little of the defendant in the ten (10) year period of time before his incarceration.

Thus, the Court finds this mitigating circumstance was proven and assigns it very little weight.

10. The defendant is a dedicated uncle to his nephews.

The defendant comes from a very close-knit family. They have continued to support the defendant despite his legal issues.

Thus, the Court finds this mitigating circumstance was proven and assigns it very little weight.

11. The defendant needs specialized treatment for a mental disorder unrelated to substance abuse.

Dr. Sesta testified that the defendant suffers from anxiety and depression in part, due to his incarceration. He further opined that the defendant could benefit from counseling in prison for those disorders.

Thus, the Court finds this mitigating circumstance was proven and assigns it very little

weight.

12. The defendant has a severe, chronic alcohol and cocaine addiction, for which he is in need of treatment.

Dr. Sesta does not agree that the defendant has a severe, chronic alcohol and cocaine addiction, for which he is in need of treatment. Dr. Sesta testified that, "he certainly needed treatment at the time of the offense and that since being a prisoner he has, dried up and detoxed and doesn't need substance abuse counseling."

Thus, the Court finds this mitigating circumstance was not proven.

Statutory Mitigating Circumstances

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Dr. Kremper and Dr. Sesta agree that the defendant has some traits of antisocial personality disorder but lacks all of the necessary traits to be diagnosed with antisocial personality disorder.

Dr. Chacko, Dr. Kremper, and Dr. Sesta agree that the defendant has polysubstance dependency. They each believe he was using drugs and alcohol at the time of the offense.

Finally, Dr. Sesta opined that the defendant has moderate brain impairment as a result of numerous head injuries. Furthermore, the use of drugs and/or alcohol further exacerbates his neurological impairment.

Thus, the Court finds this mitigating circumstance was proven and assigns it moderate to great weight.

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Dr. Kremper testified that the defendant was functioning at a low intellectual level and was dependent on drugs and alcohol. The long-term effects of alcohol and drugs would have impaired

the defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

Dr. Sesta testified that he found empirical evidence of moderate brain impairment. It was his opinion that the impairment was the result of "serial head injuries, the most severe of which....involved a motorcycle accident...."

Dr. Sesta was also of the opinion that the defendant suffers from dementia, which is "defined neurologically as a significant impairment in memory." Further, Dr. Sesta opined that the defendant has a low IQ. He concluded that someone with a low IQ, dementia, and moderate brain impairment would further exacerbate their neurological impairment through the use of drugs and alcohol.

Dr. Sesta agreed that the defendant lacked the capacity to appreciate the criminality of his conduct and that his ability to conform his conduct to the requirements of law was substantially impaired.

Thus, the Court finds this mitigating circumstance was proven and assigns it great weight.

C. SPENCER HEARING

The Spencer hearing was conducted on July 29, 2011. The Defense called one (1) witness: Joseph John Sesta, PhD., M.P. Dr. Sesta is a licensed medical psychologist and is board certified in adult and pediatric neuropsychology and forensic neuropsychology. Dr. Sesta's testimony was discussed at length under the second statutory mitigating circumstance above.

D. CONCLUSION

This Court understands that the weighing and comparing of aggravating circumstances against the mitigating circumstances is not a simple mathematical formula. Rather, it is a deliberate process in which the Court must review the nature and quality of each of the aggravating circumstance versus the nature and quality of each of the mitigating circumstances.

The Court must assign a weight or value to each aggravating circumstance and each mitigating circumstance. This Court also gives great weight to the jury's recommendation.

The Court finds that the State has established beyond a reasonable doubt four (4) aggravating circumstances that apply to the murder of Noah Scott. Further, the Court finds that defense has established eleven (11) non-statutory mitigating circumstances and two (2) statutory mitigating circumstances.

After a thorough analysis and review of the aggravating and mitigating circumstances, the Court finds the aggravating circumstances far outweigh the mitigating circumstances for the murder of Noah Scott. Additionally, the Court is of the opinion that the heinous, atrocious, and cruel aggravator alone outweighs all mitigating circumstances in this case. Accordingly,

IT IS THE JUDGMENT OF THIS COURT:

For the murder of Noah Scott, the defendant, having been adjudicated guilty, is now sentenced to be put to death in the manner prescribed by law.

DONE AND ORDERED in Bartow, Polk County, Florida this 19th day of August, 2011.

/s/ J. MICHAEL HUNTER

J. MICHAEL HUNTER
Circuit Judge

Copies furnished to:

ASA, John Aguero
ASA, Hope Pattey
Daniel Hernandez, Esquire
Lee Cohen, Esquire
Marc Anthony Poole